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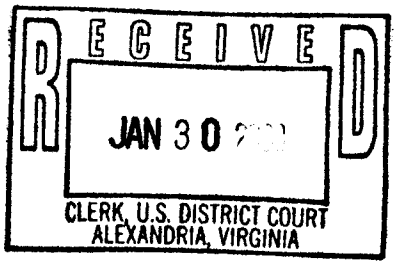

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED WITH
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DATE 1/23/03

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	
	)	

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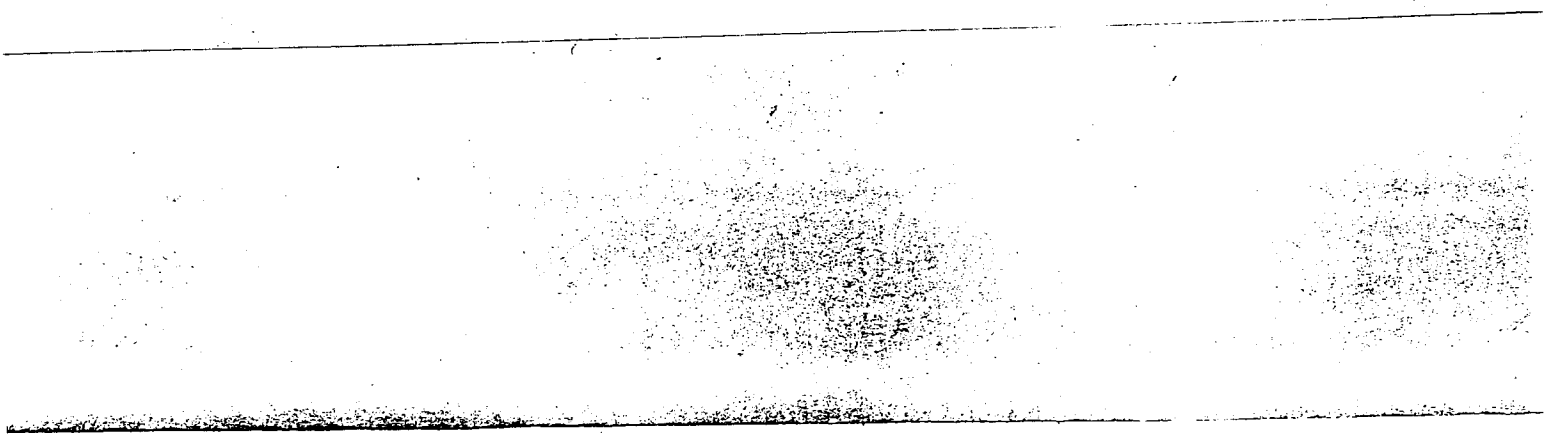

II. SUMMARY OF THE ARGUMENT

Faced with the Court's determination that there was to be no further delay in answering the question of whether access to any of the witnesses at issue would be granted, a question which has essentially had this case on hold for months, the government stalls for more time to answer the question. It does this by filing a legal brief which it could have filed in the normal response time last fall when defense motions for access were filed, arguing that there is no legal basis for granting what the defense is requesting. By splitting the unsplittable—the concept that a defendant has the right to call witnesses on his own behalf, into separate issues of pretrial access and trial access—the government argues that there is no right to pretrial access and that the question of trial access can be put off until after the trial begins. We contend that the basic right to call witnesses on one's own behalf necessarily includes the right to try to

talk to those witness before doing so without government interference. By contending otherwise, the government essentially seeks to seriously infringe upon the broader right.[27]

[27] Of course, the witness can refuse, but that is the choice of the witness, not the government.

Third, there is no precedent for denying a defendant facing the death penalty access to such witnesses. The government ignores the ramifications from the fact that

this is a death penalty case. Concerns are not only for due process, but there are also Eighth Amendment considerations and statutory considerations which serve to assure that a defendant facing death has equal access to evidence and that the fact finding process is of higher reliability than the ordinary case. This includes relaxed rules of evidence and materiality in the penalty/mitigation phase. Whether some new rule might be born post September 11 with regard to defense access to witnesses who clearly possess *Brady* information, a death penalty case is not the place for its creation because death is different.[29]

[29] *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability . . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.") (Marshall, J., plurality opinion) (citations omitted).

III. RESPONSES TO SPECIFIC ARGUMENTS OF THE GOVERNMENT

B. The Government's Reliance On *Valenzuela-Bernal*, *Roviaro*, And Related Cases To Support The Denial Of Pretrial Access To The Witnesses Is Misplaced

In its Consolidated Response, the government places great reliance upon the holding in *Valenzuela-Bernal*, 445 U.S. 858 (1982), to justify the denial of pretrial access to a potential defense witness. An examination of the facts in *Bernal*, as well as a review of the many authorities cited by the government, shows that the issue posed in this case is not addressed in *Bernal*.

In *Bernal*, the United States arrested the respondent, a citizen of Mexico, for illegally transporting five other Mexican aliens into the United States. *Id.* at 860. The five aliens were passengers in a car driven by respondent. *Id.* When the car approached the border checkpoint, Customs Agents noticed the five passengers lying down inside the car. *Id.* at 860-61. Rather than stop as directed, respondent sped off, eventually stopping and abandoning the car along with his passengers. *Id.* at 861. Respondent and three of the passengers were subsequently caught. *Id.*

After apprehension, respondent and the three caught passengers were questioned and based thereon, two of the passengers were immediately deported back to Mexico. *Id.* The other passenger was detained for use by the government at respondent's trial. *Id.* Thereafter, respondent was indicted and when he could not secure the appearance of the two deported passengers, he moved to dismiss the indictment claiming their deportation violated his Fifth Amendment right to a fair trial and his Sixth Amendment right to compulsory process of favorable witnesses. *Id. See also United States v. Valenzuela-Bernal*, 647 F.2d 72, 73 (9th Cir. 1981), *rev'd*, 458 U.S. 858 (1982).

The Supreme Court disagreed and affirmed respondent's conviction. The Court held that a constitutional violation "requires some showing that the evidence lost would be both material and favorable to the defense." 458 U.S. at 873. Further, "[a]s in other cases concerning the loss of material evidence," the Court stated, "sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 873-74.

Simply stated, the "lost" witnesses in *Valenzuela-Bernal* had been deported before the defendant had even been indicted and the court and the defense were compelled to address the due process deprivation caused by the pre-indictment loss of the witness within the framework of the trial. Here, by contrast, we know that these witnesses are available for trial, that Mr. Moussaoui knows who these witnesses are, that these witnesses possess *Brady* information, and that the government does not wish to allow defense access to them. Thus, the evidence the defense seeks has not

been lost - it is only being withheld. That distinction is critical here where the evidence is requested prior to trial and the defendant enjoys the presumption of innocence.

Further, defense access to the witnesses should not depend on establishing that the government has acted in "bad faith." The issue of "good faith" versus "bad faith" is simply inapplicable to this case because the evidence here cannot be said to be "lost." This distinction was addressed in *United States v. Hsin-Yung*, 97 F. Supp.2d 24 (D.D.C. 2000). In that case, unlike the instant case, the witnesses were deported and made unavailable before the defendant was indicted or had the opportunity to request that the witnesses be retained for trial.[44] The district court noted that the holding in *Valenzuela-Bernal* allows the government to promptly deport witnesses "upon its 'good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution.'" *Id.* at 30 (quoting *Valenzuela-Bernal*, 458 U.S. at 873). No case cited by the government, including *Bernal*, holds that proof of bad faith is required before the government can be compelled to produce relevant and material evidence that is still in its possession, i.e., not "lost."

All of the other "good faith" cases cited in the government's Consolidated Response similarly address the propriety of guilty verdicts obtained when a defendant has complained that some official act - usually deportation - has deprived him or her of a witness. These cases consider the question of good faith *after* the evidence has been "lost" or otherwise made unavailable and often in the context of a motion to

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[44] The witnesses at issue in *Yung* were over 200 Chinese nationals who aboard a boat on which aliens were allegedly being smuggled into the United States by the defendants. *See* 97 F. Supp.2d 24, 30.

dismiss the indictment, thereby sanctioning the government for losing or making the evidence unavailable. This standard is not applicable when the defendant seeks pretrial access to material witnesses who are still available.

Illustrative of this distinction is *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000), *cert. denied*, 531 U.S. 1026 (2000), where the alien witnesses were initially held in the United States to allow the defense to interview them and then subsequently deported upon the authority of the district court.[45] The good faith of the government's actions was an issue in that case only because the evidence was "lost." As the court explained,

> [T]he [Supreme] Court [has held] that, when the Government has evidence that it knows to be exculpatory, it must disclose that evidence to the defendant. That situation is different, the [Supreme] Court [has] held, from one in which the Government loses or destroys evidence that it does not know to be exculpatory. With respect to lost or destroyed evidence, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

Chaparro-Alcantara, 226 F.3d 616, 623 (citations omitted).

Likewise, the other cases cited by the government are distinguishable as involving determinations of "bad faith" in situations where the evidence has been "lost" or otherwise made unavailable. *See United States v. Pena-Guttierrez*, 222 F. 3d 1080, 1086 (9th Cir. 2000) (witness was deported before the defense had requested access and even before the decision to prosecute had been made), *cert. denied*, 531 U.S. 1057 (2000); *United States v. Iribe-Perez*, 129 F.3d 1167, 1174 (10th Cir. 1997) (witness was allowed to voluntarily leave the country a week before the defendant was even

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[45] The witnesses were thirteen undocumented Mexican nationals who were allegedly being transported illegally by the defendants. *See* 226 F.2d 616, 618.

arrested); *United States v. Armenta*, 69 F.3d 304, 307 (9th Cir. 1995) ("lost" evidence case where the witness was deported because of the negligence of the government); *United States v. Dring*, 930 F.2d 687, 689 (9th Cir. 1991) (potential witnesses were deported before the indictment was returned and before they were even interviewed by the government), *cert. denied*, 506 U.S. 836 (1992); *Buie v. Sullivan*, 923 F.2d 10, 12-13 (2nd Cir. 1990) (no showing of lost evidence where a witness refused to testify as a result of his arrest on the same charges); *United States v. Rivera*, 859 F.2d 1204, 1207 (4th Cir. 1988) (witnesses deported only after evidence was preserved pursuant to 18 U.S.C. § 3144), *cert. denied*, 490 U.S. 1020 (1989); *United States v. Rouse*, 111 F.3d 561, 566 (8th Cir.) (evidence was unavailable to the defense solely because the defense never sought access to it), *cert. denied*, 522 U.S. 905 (1997); *United States v. Truong Dinh Hung*, 629 F.2d 908, 929-30 (4th Cir. 1980) (no proof of bad faith where witness/ambassador was expelled from the United States before the defense interviewed him).[46]

The government moves from the lost evidence line of cases to the *Roviaro*-type balancing test set forth in *Roviaro v. United States*, 353 U.S. 53 (1957), for withholding confidential informants; but that case does not help the government here. First, as a practical matter, it is not altogether clear that the balancing test utilized in *Roviaro* applies to the witnesses given that they are not government informants. *See id.* at 54-55 (stating that the issue before the Court was "whether the United States District Court

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[46] Interestingly, at the urging of U.S. District Judge Albert V. Bryan, Jr., the government in *Truong Dinh Hung* agreed to a court order enjoining it for a limited period of time from taking action to expel the witness so as to allow the defense an opportunity to speak to the witness. *See* 629 F.2d 908, 929.

committed reversible error when it allowed the Government to refuse to disclose the identity of an undercover employee" who might be a material witness in the case). Moreover, these witnesses, to the extent they should be treated as informants, would not be shielded from production at trial (much less identification) under the *Roviaro* test.[47] That test states when an informant plays "a crucial role in the alleged criminal transaction" disclosure and production at trial is required to ensure a fair trial. *United States v. Diaz*, 655 F.2d 580, 587 (5th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *accord United States v. Jiles*, 658 F.2d 194, 196-97 (3d Cir. 1981) (stating that in cases "in which the informant played an active and crucial role in the events underlying the defendant's potential criminal liability . . . disclosure and production of the informant will in all likelihood be required to ensure a fair trial"), *cert. denied*, 455 U.S. 923 (1982).

[47] The Supreme Court in *Roviaro* held that "[w]here the disclosure of an informer's identity, or of the contents of his communications, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60-61.

The government's arguments also neglect to consider that the witness access issue before the Court is arising in a *pretrial setting*. As the court noted in *United States v. Sudikoff*, 36 F. Supp.2d 1196, 1199 (C.D. Cal. 1999),

> [The post-trial] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material. . . . This analysis obviously cannot be applied by a trial court facing a pretrial discovery request.

Id. at 1198-99. *See also United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) ("[A]t this pre-trial stage, the defendants need only establish a 'substantial basis for claiming' that a mitigating factor will apply at the penalty phase, in order to invoke the Government's obligation . . . to produce any evidence which is material to that mitigating factor.") (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976). *See also United States v. Peitz*, 2002 WL 226865 (N.D. Ill. 2002) (adopting the *Sudikoff* test) (unpublished opinion); *United States v. Glover*, 1995 WL 151823 (N.D. Ill. 1995) (same)

(unpublished opinion).

C. In The Weighing Process, The Government Again Ignores The Ramifications From The Fact That This Is A Capital Case

The need for the defense to have access to the witnesses is strengthened

dramatically by the fact that this is a capital prosecution. In *Murray v. Giarratano*, 492 U.S. 1 (1989), the Supreme Court noted that "additional safeguards [are] imposed by the Eighth Amendment at the trial stage of a capital case." *Id.* at 10 (plurality opinion). *See also id.* at 8-9 ("The finality of the death penalty requires 'a greater degree of reliability' when it is imposed.") (citation omitted). This is true not only as to the sentencing phase of a capital trial, but also to the guilt/innocence phase. See *id.* ("We have recognized on more than one occasion that the Constitution places special constraints on the procedures used *to convict an accused of a capital offense* and sentence him to death.") (emphasis added) (citing *Beck v. Alabama*, 447 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).[49]

As the Court explained in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Constitution requires a reliability in capital cases that has no parallel in non-capital cases.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment, than imprisonment for a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

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[49] *See also Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.") (citation omitted);id. at 638 ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the *guilt determination* [in a capital case].") (emphasis added).

Id. at 305. Consequently, decisions in *non-capital* cases are of limited use in *capital cases* in determining when a defendant's fundamental due process right to evidence, including the right to interview witnesses, may be limited based upon a government claim of competing interests.

In the Consolidated Response the government cites only three capital cases, none of which control, or even provide much guidance for, the situation presented here. In *United States v. Tipton*, 90 F.3d 861 (1996), *cert. denied*, 520 U.S. 1253 (1997), the Fourth Circuit rejected a challenge to the procedures adopted by the trial court to protect government witnesses, but, in so doing, it clearly did not endorse those procedures. The trial court had allowed the government not to disclose pretrial the addresses of witnesses in the Witness Protection Program, although it required that they be made available for defense interviews before they testified. It also had rejected the defendant's objection to the prosecutor advising the witnesses that it was their own choice whether or not they met with defense counsel. *Id.* at 889. However, the trial court had "admonished the prosecution that the defense was to have a *meaningful opportunity* to seek interviews." *Id.* (emphasis added).

In rejecting the defense challenge on appeal, the Court of Appeals in *Tipton* unsurprisingly found that the defense was not entitled to compel an interview over the objection of the witness and that defense counsel had actually been given the opportunity to meet with all the witnesses during the trial. See *id.* As to the government's refusal to provide the addresses, the Fourth Circuit found a violation of 18 U.S.C. § 3432 "that may not have been curable, as the district court sought to do by

drawing on the 'spirit' of the Witness Protection Program." *Id.* (citation omitted). However, the Court found no "prejudicial error," since, on appeal, the defendants had been unable to show any "particularized prejudice" "from any impairment or interference with the right." *Id.* (citation omitted). Thus, *Tipton* stands only for the proposition that, *on appeal*, a capital defendant must demonstrate actual prejudice to obtain relief from a violation of the rule requiring the pretrial disclosure of addresses. That decision does not, as the government implies, endorse the proposition that the government may be excused from its obligations to provide a "meaningful opportunity" to conduct interviews of all government witnesses. *Id.* at 889. *Cf.* Consolidated Response at 38, n.27 (stating that *Tipton* "[upholds] the denial of pretrial access to witnesses in a capital case"). In any event, we are not here dealing with a government witness; we are seeking to interview and obtain testimony from defense witnesses.

The other two capital cases cited by the government are also inapposite to the question of pretrial access. *See United States v. Edelin*, 128 F. Supp. 2d 23 (D.D.C. 2001); *United States v. Heatley*, 994 F. Supp. 483, 489 (S.D.N.Y. 1998). In *Edelin*, the first of these cases, the court held that because defendants posed a specific threat to *government witnesses* and because the government had disclosed all evidence unless it threatened the safety of a witness,[50] the defendants were not entitled to disclosure of confidential informant identities, early disclosure of witness names, or pretrial disclosure of statements of individuals who were not to be called as witnesses. *Edelin*, 128 F.

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[50] The indictment in *Edelin* included charges related to violence against potential witnesses and the court made a specific pretrial finding of danger to witnesses based on government proffers of known attempts by defendant to interfere with the judicial process, including a contract to murder a potential witness. *Id.* at 29-30.

Supp.2d at 31. The court found that "[t]he dangerousness of the defendants, their access to other individuals who are willing to act on their behalf, and their willingness to approach potential witnesses in this case in order to alter or prevent damaging testimony all indicate that the defendants should not be provided with the information they seek in the discovery motions and the requests for witness and informant names." *Id.*

United States v. Heatley also is inapposite. In *Heatley* the court used the *Roviaro* test to conclude that there had not been a showing of materiality[51] and so denied the defendants' motion to disclose informants, cooperators and witnesses.

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[51] Materiality, under *Roviaro*, is anything that is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ." *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

Heatley, 994 F. Supp at 489. The court also made a specific finding that disclosure would place the individuals in substantial and immediate risk by defendant.[52] *Id.* While holding that pretrial disclosure of a witness list was not required based on a finding of defendant's dangerousness to the witnesses, the court reserved a decision on whether the government would be required to disclose the identities of informants or cooperators it would not call at trial and on whether the witness list would need to be disclosed later under § 3432. *Id.*

The government's proposed solution to the death penalty concerns voiced by standby counsel, namely that it stipulate to Mr. Moussaoui's lesser culpability as compared to other September 11 co-conspirators (*see* Consolidated Response at 42-43), is plainly inadequate. First, it fails to address the mitigating circumstance that is likely to be the most important in this case, namely, that Mr. Moussaoui's participation, if any, in the events that led to the deaths of the victims in this case was relatively minor and caused death to no one.[53] This mitigator involves a fundamentally subjective judgment by a jury that can not readily be reduced to a simple stipulation, but rather requires a detailed investigation and presentation of evidence.[54]

Related to this mitigating factor, but even more critical, is the *constitutional* issue

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[52] The defendants in *Heatley*, like those in *Edelin*, were charged with crimes including intentional killings of potential witnesses. 994 F. Supp. at 487.

[53] This is distinct from the equally culpable co-defendant mitigating circumstance to which the government has offered to stipulate. See Consolidated Response at 42, n.32.

of whether the extent of Mr. Moussaoui's involvement in the underlying felonies provides a sufficient basis for the death penalty. See *Tison v. Arizona*, 481 U.S.137 (1987). The government has not even suggested how, or if, this could be resolved by stipulation, without the benefit of defense access to the witnesses in the government's custody.

In *Tison*, the Supreme Court declared that the *minimum* constitutional (Eighth Amendment) basis for death eligibility could be established by proof that a defendant was a "major participant" in the underlying felony, if that felony "carr[ies] a grave risk of death . . . ." *Tison*, 481 U.S. at 157-58 (emphasis added). The distinction between major participation and participation of a lesser extent, however, is often subtle, *cf. Tison* and *Enmund v. Florida*, 458 U.S. 782 (1982), and thus does not readily lend itself to stipulation. There is, of course, much room between "major" and "minor" participation, all of which inures to the benefit of the defendant. The difference between the two means that even witnesses who implicate Mr. Moussaoui in the charged offenses could be of benefit to him in demonstrating that his participation was not "substantial." See *Tison*, 458 U.S. at 158. Mr. Moussaoui, therefore, has not only a Fifth and Sixth Amendment right to access to the witnesses, but an Eighth Amendment right as well.

Finally, it is clear that whatever limited right the government has to withhold evidence is constrained by the defendant's constitutional rights. See *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990). In a capital case, that includes all the rights outlined above, including Mr. Moussaoui's Eighth Amendment right to

"heightened reliability" at both phases of his trial, and his statutory right in a capital case to call witnesses on his own behalf under 18 U.S.C. § 3005. Further, since this request is being considered pretrial, he his entitled to any such evidence "which might reasonably be considered favorable" as to the question of guilt or the question of punishment. Most notably in relation to the witnesses at issue, it must include any evidence which might demonstrate to a jury that Mr. Moussaoui's participation in the alleged offenses was something less than "major," irrespective of whether other more culpable individuals will receive the death penalty for their participation in the same offenses.

latter cases, the separation of powers provided a limitation on the courts' powers since it was the petitioners, not the government, who were invoking the jurisdiction of the courts. Here, the witnesses who are in the government's custody are not attempting to contest the legality of their confinement by seeking to invoke the jurisdiction of this Court. Rather the defendant, who is on trial for his life, is seeking access to material witnesses who can testify to facts that may ultimately save him from the death penalty. The cases relied on by the government in which petitioners are seeking the jurisdiction of the federal courts to review the legality of their detentions, are, therefore, inapposite. Jurisdiction already exists here by virtue of the actions of the Executive.

Moreover, the government is erroneous in its contention that the territorial constraints contained in 28 U.S.C. § 2241 for the issuance of the Great Writ are also applicable to a writ of *ad testificandum*. A number of federal courts including the Fourth

Circuit have ruled that the writ of *ad testificandum* is not confined to the same territorial limitations as the Great Writ, but can be applied extraterritorially. See *Carbo v. United States*, 364 U.S. 611, 618 (1961) (holding that the territorial limitation of 28 U.S.C. § 2241 applies only to the Great Writ); *Muhammad v. Warden*, 849 F. 2d 107, 114 (4th Cir. 1988) (finding that the Supreme Court's analysis in *Carbo v. United States* applied equally to a writ *ad testificandum* and that such a writ could be issued extraterritorially). *Accord ITEL Capital Corp. v. Dennis Mining Supply and Equip.*, 651 F. 2d 405, 406-07 (5th Cir. 1981); *Stone v. Morris*, 546 F.2d 730, 737 (7th Cir. 1976); *Greene v. Prunty*, 938 F. Supp. 637, 638 (S.D. Cal. 1996); *Atkins v. New York*, 856 F. Supp. 755, 758-59 (E.D.N.Y. 1994).[60]

Finally, the government's reliance on the recent Fourth Circuit decisions in the *Hamdi* matter[63] is completely misplaced. Hamdi was captured in Afghanistan where he was designated as an enemy combatant and taken to the United States Naval Base in Guantanamo Bay, Cuba. Upon determining that Hamdi was a United States citizen, the government transferred him to the United States Navy Brig in Norfolk, Virginia. The Fourth Circuit limited its examination of Hamdi's detention to whether the government's averments in its affidavit that Hamdi was an enemy combatant were sufficient to justify his detention. Once the court of appeals determined that the affidavit was sufficient, no further inquiry into Hamdi's detention was necessary because to go further would intrude upon the separation of powers and involve the court in the second guessing of combat personnel in a theater of military operations who made the initial decision to detain him.

[63] *Hamdi v. Rumsfeld*, __ F.3d __, 2003 WL 60109, 2003 U.S. App. LEXIS 198 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

E. The Government Must Face The "Hobson's Choice" Of Allowing Access Or Dismissing The Charges

As has been noted previously, *Valenzuela-Bernal* is a "lost" evidence case.[65] Simply put, the issue confronting the Supreme Court in *Valenzuela-Bernal* was whether the *irreversible past actions* of the government in the context of that case amounted to a constitutional violation. That problem is entirely different from the one facing this Court, where the government's conduct is ongoing and still remediable. It is the difference between a driver looking at an automobile accident in the rear-view mirror as opposed to the driver seeing the accident unfold from the view of the front windshield. In the former situation, the collision has already occurred and there is nothing that can be done about it; in the latter, the accident is occurring and corrective action can still be taken.

This crucial difference explains why *Valenzuela-Bernal* is inapplicable to the witness access issue currently before the Court. Rather, the holdings of the *Andolschek* line of cases – the rationale of which is that "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense," *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (summarizing the rationale of the *Andolschek* line of cases and distinguishing the government's obligation in civil cases from criminal cases where national security information is involved) – are much more on point.

United States v. Powell, 156 F. Supp. 526 (N.D. Cal. 1957), is illustrative. In that

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[65] *See* Part III.B *supra*. *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (referring three times to the fact that the evidence in *Bernal* was "lost").

case, defense counsel sought passport clearance from the U.S. State Department to travel to Communist China and Korea to interview witnesses and gather documents necessary for trial. *Id.* at 527-28. The State Department refused. *Id.* The district court, noting that it was "within the power of the United States to make possible the obtaining of [the] evidence,"[66] and that the Court has the duty to assure a fair trial, ordered the government to issue the passport or face dismissal of the indictment. *Id.* at 534-35. As the court stated,

> The United States has commenced and is prosecuting this criminal proceeding against the defendants. . . The defendants have the constitutional right to present evidence [to contradict the charges]. They can, at least, have the opportunity to try to obtain this evidence, if the United States issues [passport clearance to defense counsel] . . . . So, the United States has its choice. It can choose to adhere to its policy of non-issuance of such passports. Or it can decide that it is more important to prosecute this criminal case. If the former be its choice, it will mean a discontinuance of the present prosecution.

156 F. Supp. 526, 530.

Similarly, in *Jencks v. United States*, 353 U.S. 657 (1957), the government, relying on confidentiality rules, refused to produce to defense counsel reports prepared by two FBI informants that related to events as to which the informants testified at trial. *Id.* at 665-66. Quoting extensively from *Andolschek*, the Supreme Court reversed the conviction of the defendant and directed the district court to order the government to produce the reports. *Id.* at 671-72. The Court's words are apropos to the current situation.

> It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession.

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[66] 156 F. Supp. 526, 531.

> But this Court has noticed, in *United States v. Reynolds*, 345 U.S. 1 [(1953)], the holdings of the Court of Appeals for the Second Circuit [citing *inter alia* to *Andolschek*] that, in criminal causes ". . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . ."

353 U.S. 657, 670-71 (citations omitted).

Other courts have held similarly. *See United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (overruling the government's objection to releasing confidential government records to the defense, stating that "the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defence"), *cert. denied*, 342 U.S. 920 (1952)[67]; *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946) (ordering, over objection, the production to the defense of confidential government records, and noting that "when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege"); *United States v. Grayson*, 166 F.2d 863, 870 (2d

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[67] The court in *Coplon* also observed:

> Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952).

Cir. 1948) (holding that the prosecution cannot rely on a confidentiality privilege to deny defense access to government records that bear upon the charges and that the indictment by the government "put the prosecution and the [effected government agency] collectively to a choice, either not to suppress all the evidence within their control which bore upon the charges, or to let the offenses go unpunished"); *Johnson v. Reno*, 92 F. Supp.2d 993, 994-95 (N.D. Cal. 2000) (ordering the production to a defendant of material in the possession of the ATF, DEA and FBI, and citing *Andolschek* as support therefor); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 560-61 (S.D.N.Y.) (holding in a habeas corpus proceeding, that as the government had taken the action of detaining the petitioner, it was deemed to have abandoned its privilege to withhold confidential records from the petitioner that the district court had ordered produced because of their relevancy), *aff'd*, 158 F.2d 853 (2d Cir. 1946).[68]

The government thus is wrong when it asserts that it cannot be forced to choose between competing Executive Branch responsibilities. *See* Consolidated Response at 15-16.[69] *Andolschek*, *Jencks* and similar cases make clear that when the government,

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[68] See also *Kawaguchi v. Acheson*, 184 F.2d 310, 311 (9th Cir. 1950) (finding error with district court's refusal to grant a trial continuance to plaintiff where the sole reason for the continuance was the government/defendant's refusal to allow the plaintiff to enter the United States to attend the trial, and stating, "where the availability for trial of the principal witness for the party having the burden of proof is controlled exclusively on the administrative level by that party's adversary, our concept of due process dictates that such a cause be not heard upon its merits while that barrier, constituting the sole reason for the complainant's unavailability for trial, obtains by reason of appellee's failure to act in accordance with the provisions of the statute").

[69] "[T]he very point of *Valenzuela-Bernal* was to protect the functioning of an Executive Branch that has myriad responsibilities and to ensure that, when it acts in good faith to carry out one of its multiple duties, it could not be charged with a constitutional violation and would not be constantly hamstrung by the sort of Hobson's choice standby counsel would like to impose." Consolidated Response at 15-16.

because of some competing interest, chooses to withhold from the defense evidence that the court feels should be produced, the government must choose between the competing interests and either produce the evidence or dismiss the prosecution.[70] The holding in *Valenzuela-Bernal* does not undermine this principle because in that case the government had already lost possession of the evidence before the defendant had even sought access to it and therefore, there was no longer a "choice" for the government to make.[71]

Hence, while it is true that *Valenzuela-Bernal* recognizes the government's "dilemma" when faced with competing responsibilities,[72] the government overstates its case when it says that "[a]t bottom, *Valenzuela-Bernal* recognizes that the Government must fulfill a variety of obligations simultaneously and that when good faith fulfillment of those obligations, such as the enforcement of the immigration laws, precludes a defendant's access to witnesses, even at trial, due process does not require the dismissal of the prosecution." Consolidated Response at 16, n.8. *Bernal* does not relieve the government from its due process obligation, as articulated by the

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[70] This principle also is reflected in CIPA § 6(e)(2), to wit, that dismissal of the indictment, *inter alia*, is appropriate "[w]henever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information" which the court believes is necessary to the defense.

[71] For the same reason, the government's reliance on *Hamdi v. Rumsfeld*, __ F.3d __, 2003 WL 60109, 2003 U.S. App. LEXIS 198 (4th Cir. 2003) also is misplaced. In that case, the government had not initiated a criminal prosecution against Hamdi, so it was not saddled with the due process obligations of ensuring a fair trial. The Fourth Circuit specifically noted this fact. *See id.* at 2003 WL 60109, *17 ("As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime."). *See also id.* at *15 (noting that "we are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers").

[72] See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 865-66 (1982); Government's Consolidated Response at 16.

Andolschek line of cases, from choosing between competing duties when it is still within the government's power to so choose, i.e, when the evidence is still available and not beyond control of the government. Indeed, the Supreme Court specifically stated in *Jencks* that the government cannot avoid this choice, difficult as it may be.

> The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

Jencks v. United States, 353 U.S. 657, 672 (1957).[73]

The government argues that many of the issues posed by this dispute can be resolved through the CIPA process by which stipulations can be agreed upon by standby counsel and summaries or substitutions can be used in lieu of granting actual access to the witnesses. *See* Consolidated Response at 37. This process, however,

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[73] Further, despite what the government contends, *see* Consolidated Response at 16, n.8, the fact that Justice Brennan writing in dissent in *Valenzuela-Bernal* cites *Andolschek* in support of his argument does not undercut standby counsel's position. First, it is just pure speculation to conclude that the majority in *Bernal* intended to overrule the *Andolschek* line of cases, not only because the majority never refers to those cases, including *Andolschek*, but also because *Andolschek* has been cited approvingly by the Supreme Court on at least four occasions. *See Dennis v. United States*, 384 U.S. 855, 873, 874 n.20 (1966) (citing *Andolschek* with approval and noting that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact"); *Jencks v. United States*, 353 U.S. 657, 671 (1957) (quoting *Andolschek* approvingly (and extensively) for the proposition that "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense"); *United States v. Roviaro*, 353 U.S. 53, 60-61 (1957) (citing with approval *Andolschek* for the principle that "the trial court may require disclosure [of an informant's identity or the contents of his communication] and, if the Government withholds the information, dismiss the action" where the disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause"); *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (citing *Andolschek* as stating the "rationale of the criminal cases" that have held that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free"). Second, for the reasons previously stated, the *Andolschek* line of cases is inapplicable to and clearly distinguishable from the "lost" evidence situation, like that in *Bernal*, as the problem of the lost evidence is no longer rectifiable.

will not work for the simple reason that Mr. Moussaoui is *pro se* and as such, has a Sixth Amendment right to conduct his own defense. As the Supreme Court stated,

> [T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).

As such, standby counsel cannot stipulate to anything in this case for doing so would constitute making a "significant tactical decision" or "speak[ing] instead of the defendant on [a] matter of importance." *Id.* In sum, stipulations agreed to by standby counsel could fundamentally undermine Mr. Moussaoui's right to represent himself if he were held to them. Standby counsel could, of course, enter into stipulations that would come into play only if standby counsel were elevated to the role of trial counsel. Further, standby counsel can make recommendations to Mr. Moussaoui as to stipulations.

Moreover, given that Mr. Moussaoui does not have a security clearance, and standby counsel lack authority to share classified information with him, standby counsel cannot determine how, if at all, Mr. Moussaoui intends to use any of the classified information in the SCIF either to prepare his defense or at trial.[74] For the same reason, standby counsel have no factual or legal basis to assist the Court in determining whether any summaries or substitutes proposed by the government "will provide the

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[74] Standby counsel have made six CIPA § 5 filings. Many documents that Mr. Moussaoui may have designated had he had the opportunity to review the world of classified material were undoubtedly omitted by standby counsel.

defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6 (c) (1). We can do this only with regard to the defense standby counsel would present were we thrust into the role of trial counsel.

We urge the Court, for the reasons set forth above, to order now that the defense be given access to the witnesses for pretrial interviews and that the witnesses be made available for the purpose of giving trial testimony. We respectfully suggest that if the Court is inclined to grant such an order, that it then give the government

fourteen (14) days to advise whether it will comply with the order and, if it intends to comply, what procedures the government proposes to satisfy the court's order.

IV. CONCLUSION

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